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**Jeffrey I. Shinder**

Attorney at Law

212-350-2709

jshinder@constantinecannon.com

March 29, 2013

**By ECF**

The Honorable John Gleeson  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 05-md-01720(JG)(JO) (E.D.N.Y.)*

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Dear Judge Gleeson:

On behalf of the Objecting Plaintiffs,<sup>1</sup> we write to advise the Court that we have no objection to the Court's appointment of Professor Alan O. Sykes, pursuant to Federal Rule of Evidence 706, to advise the Court with respect to any economic issues that may arise in connection with the forthcoming motion for final approval of the proposed settlement.

With respect to the role that any court-appointed expert witness (the "Expert") will play in this proceeding, the Objecting Plaintiffs respectfully request the opportunity to be heard on any proposed order of appointment of the Expert. We would greatly appreciate the opportunity to be heard both on how to ensure that the Expert has access to all necessary information, and on what framework should be adopted to ensure fairness to all parties.

Preliminarily, the Objecting Plaintiffs believe the role of the Expert would be enhanced if the following procedures were adopted in the order of appointment:

- (1) All parties should be copied on all communications between the Court and the Expert.
- (2) All parties should be given the opportunity to be present during any in-person or telephonic communication, apart from management details, between the Court and the Expert.

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<sup>1</sup> The Objecting Plaintiffs are Coborn's Incorporated; D'Agostino Supermarkets, Inc.; Jetro Holdings, Inc. and Jetro Cash & Carry Enterprises, LLC; Affiliated Foods Midwest Cooperative, Inc.; National Association of Convenience Stores; National Association of Truck Stop Operators; National Community Pharmacists Association; National Cooperative Grocers Association; National Grocers Association; and the National Restaurant Association.

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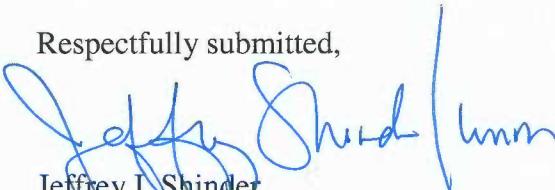
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- (3) The Expert should prepare a written report that class members can comment on at the fairness hearing.
- (4) The Expert should be authorized to request any materials from the parties that the Expert believes would be helpful in the preparation of that report.
- (5) All parties should be given the opportunity to recommend that the Expert review certain materials, including materials that such parties believe the Expert should request from any other party.
- (6) All parties should be given the opportunity to review any materials reviewed by the Expert.

We appreciate the Court's consideration of these suggestions.<sup>2</sup>

Respectfully submitted,

  
Jeffrey I. Shinder  
Counsel for Objecting Plaintiffs

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<sup>2</sup> We note that federal courts have recognized the need for such procedures to assist the court-appointed expert and to ensure the fairness of the process. *See, e.g., FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1214-15 (9th Cir. 2004) (discussing standards for the appointment of technical advisors and citing cases); Instructions to Court-Appointed Damages Expert (FED. R. EVID. 706(b)), *Brandeis Univ. v. East Side Ovens Inc.*, 1:12-cv-01508, Docket No. 235 (N.D. Ill. Apr. 13, 2012) (Posner, J.) (attached).

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

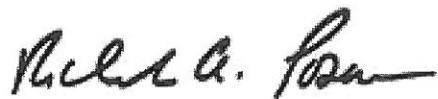
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BRANDEIS UNIVERSITY and	)
GFA BRANDS, INC.,	)
	) Nos. 1:12-cv-01508
<i>Plaintiffs,</i>	) 1:12-cv-01509
v.	) 1:12-cv-01510
	) 1:12-cv-01511
EAST SIDE OVENS INC.;	) 1:12-cv-01512
KEEBLER CO.;	) 1:12-cv-01513
FAMOUS AMOS CHOCOLATE CHIP	)
COOKIE COMPANY, LLC;	)
MURRAY BISCUIT CO. LLC;	) Judge Richard A. Posner.
VOORTMAN COOKIES LTD.;	)
BREMNER FOOD GROUP, INC.;	)
COOKIE SPECIALTIES INC.;	)
TOPCO ASSOCIATES LLC;	)
THE PILLSBURY COMPANY, LLC;	)
UNILEVER UNITED STATES, INC.;	)
CONOPCO, INC.; and	)
NESTLÉ USA, INC.,	)
	)
<i>Defendants.</i>	)

ORDER OF APRIL 13, 2012

Neither party having filed objections to his nomination, the court appoints J. Gregory Sidak to serve as an expert witness on damages pursuant to Fed. R. Evid. 706(b).

The attached instructions are hereby issued to Prof. Sidak.



United States Circuit Judge

April 13, 2012

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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BRANDEIS UNIVERSITY and	)
GFA BRANDS, INC.,	)
	) Nos. 1:12-cv-01508
<i>Plaintiffs,</i>	) 1:12-cv-01509
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FAMOUS AMOS CHOCOLATE CHIP	)
COOKIE COMPANY, LLC;	)
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VOORTMAN COOKIES LTD.;	)
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COOKIE SPECIALTIES INC.;	)
TOPCO ASSOCIATES LLC;	)
THE PILLSBURY COMPANY, LLC;	)
UNILEVER UNITED STATES, INC.;	)
CONOPCO, INC.; and	)
NESTLÉ USA, INC.,	)
	)
<i>Defendants.</i>	)

**INSTRUCTIONS TO COURT-APPOINTED  
DAMAGES EXPERT (FED. R. EVID. 706(b))**

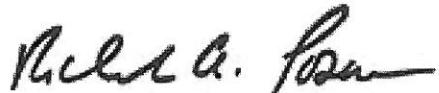
Pursuant to Fed. R. Evid. 706(b), I hereby instruct J. Gregory Sidak, the court-appointed damages expert (nominated by the court with no objection from the parties), as follows:

1. You will serve as a neutral, independent expert beholden to neither party, and will assist the court and the jury by providing expert analysis and opinions concerning damages sought by Brandeis for patent infringement, should the jury find infringement.

2. The parties will provide me with materials to forward to you that you may find helpful when forming your opinions. You may also request additional materials directly from the parties and conduct your own research.
3. I may ask your advice on whether the opinions formed by the parties' damages experts are the result of responsible research and analysis. You may, if you wish, confer with the parties' damages experts, in the presence of their lawyers if the parties so desire. You will not directly participate in any *Daubert* proceedings relating to the parties' experts, and will not be subject to a *Daubert* challenge yourself.
4. You shall treat all materials that you receive in connection with this matter as confidential, and will destroy all materials related to this matter at its conclusion. You are subject to the confidentiality provisions of the stipulated protective order submitted to the court on March 26, 2012.
5. Apart from management details, I will meet with you, or confer by phone with you, only in the presence of the parties' lawyers and, if they wish, some or all of the party experts.
6. You shall submit by January 1, 2013 a short written report explaining your findings with regard to the subject of your expert inquiry.
7. You shall sit for a deposition in January 2013 to last no more than 8 hours, in one day, or if you prefer in two consecutive days. I will preside at the deposition.
8. You will testify at the trial. I will introduce you as an expert selected by me and beholden to neither party. You will explain to the jury in simple language and in narrative form your opinion with regard to the damages issues. The parties may cross-examine you. The trial(s) will take place in March 2013. I will tell you well in advance on which day (or days) you will be needed.
9. You may reach me by email if questions come up, if you require additional materials, or if you encounter any difficulties in accomplishing your assigned tasks. You may contact me via my law clerks, whose email addresses are

Mark\_Savignac@ca7.uscourts.gov, Timothy\_Shapiro@ca7.uscourts.gov, and Daniel\_Siegfried@ca7.uscourts.gov. You should copy the following attorneys for the parties on any emails other than those relating to management details and similarly non-substantive matters: For the plaintiffs, Anthony Tomaselli, at Anthony.Tomaselli@quarles.com. For the defendants, Kevin Keenan, at kkeenan@leydig.com; John Mancini, at jmancini@mayerbrown.com; Francis Morrison, at fhm@avhlaw.com; Jennifer Hoekel, at jhoekel@armstrongteasdale.com; and Becky Thorson, at BRThorson@rkmc.com.

10. You will be compensated for the time you devote to the case at the hourly rate that we've discussed, plus expenses that you incur. You will submit timesheets to me, and each side will pay 50 percent of your bill, the defendants to divide their half among themselves as they see fit.



United States Circuit Judge

April 13, 2012